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No. 98-1894

In the

Supreme Court of the United States

PEGGY ANN BUCKLEY,
Petitioner,

v.

CALIFORNIA COASTAL COMMISSION,
Respondent.

On Petition for Writ of Certiorari to the California Court of Appeal for the Second District

BRIEF AMICI CURIAE OF PACIFIC LEGAL FOUNDATION AND DEFENDERS OF PROPERTY RIGHTS IN SUPPORT OF PETITIONER

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QUESTIONS PRESENTED

1. (a) May a state court rule, contrary to this Court's holdings in *First English Evangelical Lutheran Church of Glendale v. County of Los Angeles*, 482 U.S. 304 (1987), and *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992), that landowners who are prevented from improving and using their land for a family home by invalid and unconstitutional land use regulations—found by the court to be invalidly imposed by a government agency *acting without jurisdiction*—may be denied Fifth Amendment just compensation for the resulting regulatory taking of their land?

(b) May a state court rule that the supposed "remedy" of landowners subjected to jurisdictionally invalid and unconstitutional regulations is to knuckle under to the unlawful government demands and forego lawful use of their land on pain of losing their right to seek just compensation in court?

2. May a state court rule, contrary to this Court's holdings in *First English*, *Lucas*, and *Agins v. City of Tiburon*, 447 U.S. 255 (1980), that unconstitutional land use regulations that deny landowners all economically beneficial use of their land for many years do not justify Fifth Amendment compensation for a taking if the regulators (who lack jurisdiction to act) can come up with some arguable—albeit invalid—basis for their action?

3. May a state court nullify this Court's holding in *First English* (that the Fifth amendment compels compensation for the period of time *before* a confiscatory regulation is struck down), by ruling that no compensation can ever be constitutionally due until *after* a court invalidates the regulation?

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INTEREST OF AMICI CURIAE[1]

Pacific Legal Foundation is a nonprofit public interest legal foundation that specializes in defending property rights and other individual liberties. Since its inception 26 years ago, PLF has had extensive litigation experience in cases involving individuals adversely affected by the Respondent California Coastal Commission. For example attorneys with Pacific Legal Foundation represented Marilyn and Patrick Nollan in their battle with the Coastal Commission over its demand that the Nollan's dedicate a portion of their beachfront property in exchange for a permit necessary to build their family home. *See Nollan v. California Coastal Commission*, 483 U.S. 825 (1987). Its attorneys have also represented numerous other individuals over the years in their disputes with the California Coastal Commission, including cases that have made significant contributions to the law of regulatory takings in California. *See, e.g., Lechuza Villas West v. California Coastal Commission*, 60 Cal. App. 4th 218 (1997), *cert. denied*, 119 S. Ct. 163 (1998) (representing landowner seeking review of decision allowing state to redefine definition of property); *Healing v. California Coastal Commission*, 22 Cal. App. 4th 1158 (1994) (representing landowner seeking just compensation); *Landgate v. California Coastal Commission*, 17 Cal. 4th 1006, 953 P.2d 1188, *cert. denied*, 119 S. Ct. 179 (1998) (amicus support of landowner seeking just compensation for temporary taking).

Attorneys for Pacific Legal Foundation have also represented other property owners before this Court when regulatory agencies have taken rights in property without the payment of just compensation, *see Suitum v. Tahoe Regional*

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[1] Pursuant to Supreme Court Rule 37.6, Amici Curiae Pacific Legal Foundation and Defenders of Property Rights affirm that no counsel for any party in this case authored this brief in whole or in part; and furthermore, that no person or entity has made a monetary contribution specifically for the preparation or submission of this brief.

Planning Agency, 520 U.S. 725, 117 S. Ct. 1659 (1997), and have participated as amicus curiae in almost all of the major Takings Clause cases before this Court in the past 20 years. Finally, Pacific Legal Foundation attorneys are also currently representing Mr. Bailey Jones in a petition for certiorari before this Court in *Jones v. City of Berkeley*, Supreme Court Docket No. 98-1774, another case in which the California courts denied a property owner relief for a regulatory taking.

Because of the Foundation's experience both with the California Coastal Commission and Takings Clause litigation in the California courts, it has a unique perspective on the state of the doctrine of regulatory takings in the State of California. Because of its experience, the Foundation can contribute a unique perspective to this Court as it determines whether to grant Peggy Ann Buckley's petition for writ of certiorari.

Defenders of Property Rights is a nonprofit, public interest legal foundation dedicated to the preservation of constitutionally protected property rights. Defenders' mission is to protect those rights considered essential by the Framers of the Constitution and to promote a better understanding of the relationship among all the rights protected under the Bill of Rights. Defenders' goal of the vigorous protection of property rights recognizes the special role of federal courts in protecting those rights. Since its founding in 1991, Defenders has participated in every significant property rights case in this Court including *Del Monte Dunes v. City of Monterey*, No. 97-1235 (May 24, 1999), *Phillips v. Washington Legal Foundation*, 118 S. Ct. 1925 (1998); *Suitum v. Tahoe Regional Planning Agency*, 520 U.S. 725; *Bennett v. Spear*, 520 U.S. 154 (1997); *Dolan v. City of Tigard*, 512 U.S. 374 (1994); *Keene Corp. v. United States*, 508 U.S. 200 (1993); and *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003.

Pursuant to Supreme Court Rule 37, written permission from all parties for PLF and Defenders of Property Rights to file this brief has been lodged with the Clerk of this Court.

STATEMENT OF THE CASE

In 1976, the State of California adopted the California Coastal Act which established the California Coastal Commission and vested in that agency the power to regulate development along the California coast. The agency took its power seriously—so seriously, in fact, that the Legislature felt compelled, in 1979, to create an exemption for residential home construction in established residential neighborhoods wherein the counties, not the Coastal Commission, would have regulatory jurisdiction.

In 1988, Peggy and John Buckley purchased an inland 2.75-acre lot in Malibu for which they paid $485,000 and invested $200,000 to $300,000 in utilities and upgrades. *Buckley v. California Coastal Commission*, 68 Cal. App. 4th 178, 183-84 (1998). The lot is located in a developed residential neighborhood and, as such, is statutorily exempt from the jurisdiction of the California Coastal Commission. *Id.* at 190. The Buckleys' plan was to obtain the permits necessary to prepare the lot for the construction of a single-family home. *Id.* at 183. Although the Buckleys received certification from the county that their entire lot was exempt from Coastal Commission jurisdiction, the Coastal Commission claimed that the lower two thirds of their lot was an environmentally sensitive area and therefore still subject to its jurisdiction. *Id.* at 185.

After receiving grading and building permits from the County of Los Angeles for a single-family home in 1989, the Buckleys commenced grading. *Id.* at 185-86. The Commission issued a stop work order, threatening a $10,000 fine plus additional fines of $5,000 for every day that work continued. Appellant's Appendix at 68. In November of 1991, a landslide began to develop and the County Department of Public Works ordered the Buckleys to repair the landslide. 68 Cal. App. 4th at 185-86. Shortly after work commenced, the Commission issued another stop work order. Thus proventing the Buckleys from repairing the landslide. *Id.* at 186.

The Buckleys filed an action for declaratory relief and the Commission sought an injunction and fines. The Buckleys cross-complained for takings damages. The trial court found that the Commission had no jurisdiction over any part of the lot. It also awarded $1.3 million for a permanent taking and $831,494 in attorneys' fees and costs. *Id.* at 187.

On appeal, the court of appeal affirmed that the Coastal Commission had no jurisdiction over any portion of the lot. *Id.* at 189-90. But the court also found that there was no takings liability. *Id.* at 201. The court found that the Buckleys should have applied to the Commission (which lacked jurisdiction) for a scaled-back grading permit on the lower part of the lot that would have allowed potential development of the front part. *Id.* at 196. As for the fact that the Commission had no jurisdiction on any portion of the lot, the court found that *Landgate v. California Coastal Commission* precluded any liability:

> For better or for worse . . . the majority held that a legally erroneous decision of a governmental agency during the development process that results in a delay of the permit is not a taking, as long as there is an objective, sufficient connection between the land use regulation in question *and a legitimate governmental purpose.*

68 Cal. App. 4th at 200. In other words, even though the Commission had no jurisdiction to grant or deny any grading or other development permit on any portion of the Buckleys' lot, the Commission could not be held liable for a taking so long as there is a "legitimate purpose" to the illegitimate regulation. After the California Supreme Court denied review, Peggy Ann Buckley petitioned this Court for a writ of certiorari.

REASONS FOR GRANTING THE WRIT

SUMMARY AND INTRODUCTION

California is not a good place to own property that is coveted by a public agency. If a proposed use of the property is inconsistent with an agency's desires for the property, the landowner will not be able to use the land as the owner might wish. If an agency unlawfully asserts jurisdiction over the property and prevents it from being used, the landowner's only recourse is to employ attorneys to file a writ of mandate to get the regulation overturned. But no matter how long an agency unlawfully usurps the use of real property, the agency need not worry about Takings Clause liability, temporary or otherwise. In California, so long as the agency's motives are said to be pure, the agency is immune from takings liability. The law of regulatory takings as elucidated by this Court and followed by many other jurisdictions simply does not apply in California. As California Supreme Court Justice Janice Brown recently put it:

> When the government denies all economically viable use of property, even temporarily, it may not achieve its ends "by a shorter cut than the constitutional way of paying for the change." In these limited circumstances, government must turn square corners—except in California.

Landgate v. California Coastal Commission, 17 Cal. 4th at 1043, 953 P.2d at 1212 (quoting *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 416 (1922)) (Brown, J., dissenting).

I

THE CALIFORNIA SUPREME COURT HAS FORECLOSED THE JUST COMPENSATION REMEDY REQUIRED BY THE FIFTH AMENDMENT TO THE UNITED STATES CONSTITUTION

A. *First English* Overruled the Former California Supreme Court Rule Precluding Compensation for Regulatory Takings

In 1979, the California Supreme Court proclaimed in *Agins v. City of Tiburon*, 24 Cal. 3d 266, 598 P.2d 25 (1979), that a just compensation remedy was unavailable in that state for regulatory takings:

> [A] landowner alleging [a regulatory taking] may attempt through declaratory relief or mandamus to *invalidate the ordinance* as excessive regulation in violation of the Fifth Amendment to the United States Constitution and article I, section 19 of the California Constitution. *He may not, however, elect to sue in inverse condemnation [i.e., seek just compensation]* and thereby transmute an excessive use of the police power into a lawful taking *for which compensation . . . must be paid.*
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> . . . .
>
> In combination, the need for preserving a degree of freedom in the land-use planning function, and the *inhibiting financial force which inheres in the inverse condemnation remedy*, persuade us that on balance mandamus or declaratory relief rather than inverse condemnation [*i.e.*, just compensation] is the appropriate relief under the circumstances.

Agins, 24 Cal. 3d at 273, 276-77, 598 P.2d at 28, 30-31 (emphasis added). Owners whose property was confiscated by

excessive regulation were limited to a *due process remedy* of invalidation of the offending statute or regulation.

This Court directly confronted and overruled *Agins* in *First English*. Squarely rejecting the California Supreme Court rule that takings claimants could be limited to a due process remedy, this Court stated:

> [G]overnment action that works a taking of property rights necessarily implicates the *constitutional obligation* to pay just compensation.

First English Evangelical Lutheran Church of Glendale v. County of Los Angeles, 482 U.S. at 315 (quoting *Armstrong v. United States*, 364 U.S. 40, 49 (1960)) (emphasis added). Accordingly, the California Supreme Court doctrine espoused in *Agins* was overruled as "inconsistent[] with the requirements of the Fifth Amendment." *First English*, 482 U.S. at 311. But as will be shown, according to at least two California Supreme Court justices, "[t]he more things change, the more they remain the same." *Landgate*, 17 Cal. 4th at 1035, 953 P.2d at 1206 (Brown, J. dissenting (joined by Baxter, J.)).

B. The California Coastal Commission Has Not Embraced the Doctrine of Regulatory Takings

California's government agencies have resisted *First English* and the doctrine of regulatory takings. This is especially true of the California Coastal Commission. Peter Douglas, the Commission's long time executive director, rejects this Court's takings jurisprudence. He calls it

> unfortunate, especially when you consider we live on limited space and are a society with collective needs. The land was here long before we were.

L.A. Times, Mar. 2, 1998, at A9. Harking back to the California Supreme Court's rationale in *Agins* of an "inhibiting financial force" he claims:

> The recent rulings on "takings" issues have, directly and indirectly, stripped the public sector of important tools needed to effectively manage development of private land.

Peter Douglas, speech to the California Chapter of the American Planning Institute, Oct. 13, 1997, at 9 (visited Jun. 14, 1999) http://www.rain-org/calepa/peterdouglas.html. To regain the tool of uncompensated regulatory takings, the Commission has done everything in its power, with much success, to convince the California courts to disregard this Court's precedents in property rights. It has attacked the advocacy of such doctrines as

> something extremely corrosive [that] has been injected into our social being and the body politic that has eroded our appreciation of the collective well-being.

Id. at 5-6. The Commission is contemptuous of this Court's recent takings decisions, for example suggesting in a discussion of *Suitum v. Tahoe Regional Planning Agency*, 117 S. Ct. 1659, and *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, that

> there is no legal formula or doctrine that compels this result. Rather it is predicated on the subjective judgment, the value choices and the philosophical perspective of the judge or judges rendering the decision.

Douglas at 8.[2] The California courts have been only too happy to accommodate the state government's disdain for the Just Compensation Clause.

C. In Response to *First English*, the California Supreme Court Required Regulatory Takings Claimants to First Seek a Due Process Remedy of Invalidating the Offending Regulation via Mandamus or Declaratory Relief

In response to *First English*, the California Supreme Court created a stringent new procedural rule which has the effect of limiting claims for regulatory takings. Under the California rule of *Hensler v. City of Glendale*, 8 Cal. 4th 1, 21-28, 876 P.2d 1043, 1056-60 (1994), as-applied regulatory takings claims must proceed by way of administrative mandamus and facial regulatory takings claims must proceed by way of an action for declaratory relief. *Id.* Only if a takings claimant seeks to have the offending regulation invalidated via mandamus or declaratory relief may he then seek compensation through an inverse condemnation proceeding. *Id.*, 8 Cal. 4th at 14, 876 P.2d at 1051-52. What makes this procedural requirement unique is not only its doctrinal unsoundness,[3] but also that it

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[2] Douglas' alternative solution is reflected in his statement that unless

> [we] amend our national constitution to give Americans a constitutional right to a high "quality" of life (as in the case in India) . . . it is the courts that will be the arbiters of the debate over property rights.

Id. at 6.

[3] Outside of California, it has *never* been the law that only invalid statutes or government actions trigger liability under the Just Compensation Clause. As one commentator has stated:

> The *Hensler* opinion was [unclear] on why injured property owners should be forced to seek an invalidation remedy--the only relief provided under the

(continued...)

effectively requires plaintiffs to pursue a *due process claim* as a *prerequisite* to seeking just compensation for a regulatory taking.

Thus, in effect, the initial response of the California Supreme Court to *First English* was to establish that regulatory takings plaintiffs must first pursue a due process action before compensation under the Just Compensation Clause will even be considered. Compensation was no longer expressly foreclosed, as under *Agins*, but was reduced to a follow-on *possibility* for plaintiffs who succeeded in their claim for a due process remedy of invalidation.

D. The Recent California Supreme Court *Kavanau* Case Totally Eliminates the Just Compensation Remedy for Most Regulatory Takings Claims

In *Kavanau v. Santa Monica Rent Control Board*, 16 Cal. 4th 761, 941 P.2d 851 (1997), *cert. denied*, 118 S. Ct. 856 (1998), the plaintiff complied to the letter with California's rigorous procedural demands. His administrative mandamus petition was filed within 90 days of the rent board's confiscatory actions and, remarkably, Mr. Kavanau obtained a judgment from the California appeals court finding that the rent board's regulations were unconstitutionally confiscatory as applied to him. *Id.*, 14 Cal. 4th at 768, 941 P.2d at 855.

Mr. Kavanau then filed a timely complaint in inverse condemnation seeking compensation for the period during which the rent board had wrongfully deprived him of a fair return. The

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[3](...continued)

> cited code sections--when *legitimacy* of the regulation may be conceded by the owner from the outset. . . . Until now, it has not been suggested that a writ of administrative mandamus is required to remedy *permissible* governmental actions.

Sharon L. Browne, *Administrative Mandamus as a Prerequisite to Inverse Condemnation: "Healing" California's Confused Takings Law*, 22 Pepperdine L. Rev. 99, 125 (1994).

trial and a divided appellate court found no taking can occur if the owner retains any use of the property.

On appeal the California Supreme Court, faced with the prospect of actually having to subject an entity of California government to the discipline of the Just Compensation Clause—as required by *First English*—avoided doing so. Rather, the California high court determined that a due process remedy was not only a prerequisite to (as expressed in *Hensler*), but a *substitute* for, just compensation. According to the reasoning of the court, because Mr. Kavanau could return to the rent board and go through the petitioning process anew (to seek rent increases), this in and of itself was an adequate remedy. As the court stated: [A] remedy for [a] due process violation, if available and adequate, *obviates a finding of a taking*. *Kavanau*, 16 Cal. 4th at 782, 941 P.2d at 865 (emphasis added).

By upholding the dismissal of Mr. Kavanau's inverse condemnation complaint, the California Supreme Court's decision cannot be reconciled with this Court's teaching in *First English*:

> [A] landowner is entitled to bring an action in inverse condemnation as a result of the "self-executing character of the constitutional provision [*i.e.*, the Fifth Amendment] with respect to compensation."

First English, 482 U.S. at 315 (quoting *United States v. Clarke*, 445 U.S. 253 (1980)).

Because every takings claimant is required, under California's procedural scheme, to obtain a due process remedy as a prerequisite to pursuing inverse condemnation (*Hensler*, 8 Cal. 4th at 7, 876 P.2d at 1047), and because under *Kavanau* every due process violation with a so-called "available and adequate" due process remedy obviates the finding of a taking and therefore the payment of just compensation, the California

Supreme Court has foreclosed compensation in nearly every case.[4]

In other words, notwithstanding this Court's decision in *First English* overruling the California Supreme Court's *Agins* opinion, the California Supreme Court has in fact *revived* the *Agins* rule: just compensation is *not* available in the California courts *as a matter of law*, so long as an invalidation remedy is available.

E. Even in "Per Se" Takings Cases, California Case Law Precludes the Compensation Remedy

It is a long-settled principle of law that a regulation or ordinance effects a taking if the ordinance either (1) does not substantially advance legitimate state interests, or (2) denies an owner economically viable use of his land. *Agins v. City of Tiburon*, 447 U.S. at 260. The first prong focuses on the nature of the regulation at issue to determine whether the application of the regulation to the proposed use of the property substantially advances a legitimate governmental interest. The second prong focuses on the regulation's effect on the property at issue to determine to what extent the regulation eliminates economically viable use of the property.

In *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, this Court made clear that if a regulation operates to deny a landowner all economically beneficial or productive use of his land, a per se taking has occurred and therefore just compensation must be paid under the rule of *First English*.

Nevertheless, when the California Supreme Court was recently confronted with exactly such a "per se" regulatory

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[4] In *Kavanau* the "remedy" was the right to apply to the rent control board for higher rents from tenants in the future. This is a poor substitute for just compensation. The only exception (in theory) would be where the government persists in the application of its regulations after a court pronounced them to be invalid.

taking, that court once again confirmed that just compensation was not an available remedy in that state. In *Landgate v. California Coastal Commission*, 17 Cal. 4th 1006, 853 P.2d 1188, the Coastal Commission reached a final decision[5] with respect to the property at issue which had the effect of denying the property owner all beneficial use of his residential lot. *Landgate*, 17 Cal. 4th at 1013-15, 953 P.2d at 1191-93. Approximately two years later, this decision was overturned by a trial court thereby allowing the plaintiff to build on the lot. When the owner sought compensation pursuant to *First English* and *Lucas*, for the two-year period during which the Coastal Commission deprived him of all beneficial use of his property, the trial court awarded him $156,000 for the temporary taking. *Landgate*, 17 Cal. 4th at 1015, 953 P.2d at 1193 at 1015. However, the California Supreme Court set aside this judgment ruling that Landgate's *sole remedy was invalidation of the Coastal Commission's initial ruling*. *Id.*, 17 Cal. 4th at 1021, 953 P.2d at 1197. In other words, under *Landgate*, if a regulatory agency illegally or erroneously precludes a property owner from making *any beneficial use* of his or her property for a period of time—be it one, two, or ten years—the *landowner may not recover compensation for this temporary taking as a matter of law in California*.

The fact that the *Landgate* decision effectively resuscitates the former California rule of *Agins*—which provided for an invalidation remedy only and not a compensation remedy for

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[5] One of the ripeness requirements of a takings claim is that a property owner receive a "final decision" with respect to what exact use will be permitted of his land. *MacDonald, Sommer & Frates v. County of Yolo*, 477 U.S. 340, 351 (1986). Landgate received such a final decision: "At its February 1991 meeting the Commission denied Landgate's application." *Landgate*, 17 Cal. 4th at 1013, 953 P.2d at 1191; *see also* 17 Cal. 4th at 1033, 953 P.2d at 1205 (Chin, J., dissenting) ("[T]he Commission flatly denied the permit, and its decision was final in every sense. The Commission was not planning to take any further action.").

takings claimants—is made all too clear by comparing the practical effect of the *Landgate* decision with the *First English* opinion. In sum, under *First English*, once a regulatory action is administratively final, and where that regulation's impact is to prevent all economically productive use of the land at issue, compensation is *constitutionally compelled* for the period during the litigation that determines the validity of the regulation at issue. *First English*, 482 U.S. at 306-07. In the words of this Court:

> In this case [*i.e.*, the California court decision overruled by] the California Court of Appeal held that a landowner who claims that his property has been "taken" by a land-use regulation may not recover damages *for the time before it is finally determined that the regulation constitutes a "taking" of his property*. We disagree, and conclude that in these circumstances the Fifth and Fourteenth Amendments to the United States Constitution would require compensation for that period.
>
> . . . .
>
> While the California Supreme Court may not have actually disavowed this general rule . . . , we believe that it has truncated the rule *by disallowing damages [i.e., compensation] that occurred prior to the ultimate invalidation of the challenged regulation.*

First English, 482 U.S. at 306-07, 317 (emphasis added).

Although *Landgate* certainly does not state directly that the compensation remedy is precluded, it disavows the rule of *First English* and precludes compensation all the same. By holding that an aggrieved property owner must first sue to invalidate even a valid regulation, and that such litigation over the regulation is a "normal delay" in California's planning process which cannot— regardless of the illegality of the regulation or its effect on the property at issue—result in a taking requiring the

payment of just compensation, California law has in fact retained the *Agins* rule.

The *Buckley* opinion offers further unambiguous authority that California law precludes a compensation remedy. As described, the facts of *Buckley* are closely akin to those in *Landgate*. For over a two-year period from August, 1989, to December, 1991, the Coastal Commission precluded the owners from making *any beneficial use* of the lot at issue. *Buckley*, 68 Cal. App. 4th at 183-87. The lower courts found that the Coastal Commission had no jurisdiction over the lot. The only way the Buckleys could have developed their property would have been to submit to the unlawful jurisdiction of the California Coastal Commission. The assertion of nonexistent jurisdiction failed to advance any *legitimate* governmental interest—and, as such, was a per se taking.

Yet, the court of appeal reversed the damage award for the taking. While conceding that "[t]emporary takings which deny a landowner all use of property are not different in kind from permanent takings, for which compensation is clearly required" [citing *First English*], the court nevertheless was compelled "for better or for worse" to apply *Landgate*. *Buckley*, 68 Cal. App. 4th at 193-94, 200. In the words of the court:

> Finally, the recent decision of our Supreme Court in *Landgate precludes any monetary recovery* by the Buckleys. Boiled down to its essence, *Landgate* held that, under the facts presented, an incorrect decision of the Commission in asserting jurisdiction over property did not constitute a temporary taking [and therefore precludes compensation].

Id. at 199 (emphasis added, citations omitted).

In other words, pursuant to *Landgate* and *Buckley*, under California law, an aggrieved property owner who has suffered a temporary taking is *precluded from recovering compensation as a matter of law*: the only remedy is invalidation of the regu-

lation or government decision at issue. Together, both the *Landgate* and *Buckley* decisions illustrate the evaporation of the compensation remedy in the California courts by virtue of an interpretive slight of hand.[6]

The *Landgate*, *Buckley*, and *Kavanau* decisions together demonstrate the settled policy of the California courts to foreclose a remedy of just compensation in virtually every instance. As Justices Brown and Baxter have noted:

> When the government denies all economically viable use of property, even temporarily, it may not achieve its ends "by a shorter cut than the constitutional way of paying for the change." In these limited circumstances, government must turn square corners—*except in California*.

Landgate, 17 Cal. 4th at 1043, 953 P.2d at 1212 (Brown, J., dissenting) (quoting *Pennsylvania Coal v. Mahon*, 260 U.S. 393) (emphasis added)).

Because under California law every takings claimant is required to obtain a due process remedy as a prerequisite to pursuing inverse condemnation, and because under *Kavanau* every due process violation with a due process remedy obviates the finding of a taking and therefore the payment of just compensation (even in the context of "per se" takings, as *Landgate* demonstrates), the California Supreme Court continues to foreclose the compensation remedy. As a practical matter, *the discredited and overturned rule of Agins remains the law in California.*

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[6] The lower court's suggestion that the Buckleys might have applied for another permit does not invoke the question of ripeness under *Williamson County Regional Planning Commission v. Hamilton Bank of Johnson City*, 473 U.S. 172, 186-94 (1985), because that case did not involve an *invalid* assertion of permitting authority.

The recent case *Santa Monica Beach, Ltd. v. Superior Court*, 19 Cal. 4th 952 (1998), 968 P.2d 993, *cert. denied* (May 26, 1999), is further illustrative of the California Supreme Court's continued foreclosure of a compensation remedy in resolving takings claims. In that case, the court precluded the plaintiff from attempting to prove at trial that a city's rent control law did not substantially further the stated purpose of the law (which was to expand the range of affordable rental housing). In so holding, the court applied a *due process* standard. *Santa Monica Beach*, 19 Cal. 4th at 964-68, 972, 968 P.2d at 1000-03; *see also* Dissenting Opinion by Justice Chin, 19 Cal. 4th at 1018, 968 P.2d at 1035 ("The majority . . . inappropriately conflates takings jurisprudence with due process jurisprudence"); Dissenting Opinion by Justice Baxter, 19 Cal. 4th at 985, 968 P.2d at 993 ("[T]he majority address the wrong question and give the wrong answer. The takings clause has different and more stringent criteria than those applied under the majority's attempt to morph the deferential due process rational basis test into a takings clause test."). In short, *Santa Monica Beach* is yet another manifestation of the California Supreme Court improperly forcing a takings claim into a due process analysis capable of producing (at best) only a due process remedy. Again, because the California Supreme Court has opined that a remedy for a due process violation "obviates a finding for a taking" (*Kavanau*, 16 Cal. 4th at 782, 941 P.2d at 866), takings claimants are precluded *as a matter of law* from obtaining a just compensation remedy. (But, in the Ninth Circuit, a takings claim precludes a due process claim. *Armendariz v. Penman*, 75 F.3d 1311 (9th Cir. 1986)).

F. There Exists Not One Single Reported California Decision Awarding Just Compensation for a Regulatory Taking Since *First English*

As further evidence that the California courts have a settled policy of precluding a compensation remedy for takings claimants, a search of reported California appellate decisions

since 1987 demonstrates that not one single reported California decision awarding just compensation for a regulatory taking exists. This lack of reported cases, "like Sherlock Holmes's 'dog in the night-time' which tellingly failed to bark," Arthur Conan Doyle, *Silver Blaze, The Complete Sherlock Holmes* 335 (1930), is evidence itself of the California Supreme Court's settled policy of precluding compensation for regulatory takings claimants.

This fact is indicative of the problem to which this Court should direct its attention. Namely, because *California courts do not provide just compensation to aggrieved property owners who have had their property confiscated through regulatory actions*, the courts of that state do not provide adequate protection of federal constitutional rights guaranteed by the Just Compensation Clause.

G. If the Buckleys' Property Were Located Outside of California, They Would Have Fared Better Because Other Jurisdictions Are in Conflict with California and Recognize that Unlawful Permit Denials Can Lead to Takings

The Buckleys would be better off if they had owned their property in another state. For example, in *Cumberland Farms v. Town of Groton*, 719 A.2d 465 (Conn. 1998), the Town of Groton denied a permit to an owner of a gasoline station who desired to make improvements and build a minimart. The owner filed two lawsuits, seeking Takings Clause damages in one suit and challenging the denial of the permit in a second suit. In direct contrast to the California *Landgate* and *Buckley* decisions, the Connecticut Supreme Court held that the taking claim was ripe, noting that even if the owner prevailed on the second lawsuit and had the permit denial overturned, he still would have a ripe claim for a temporary taking. *Id.* at 472-73.

In *Cannone v. Noey*, 867 P.2d 797 (Alaska 1994), the Alaska Supreme Court found that while a "compensable temporary taking . . . would result if an ordinance were held

invalid," *id.* at 801 n.8, there was no "per se" temporary taking when an arbitrary permit denial did not destroy all economically viable use. *Id.* at 801. The case was remanded for "balancing" under *Ruckelshaus v. Monsanto Co.*, 467 U.S. 986 (1984). In California, of course, the case would not have been remanded under these circumstances because the owner must first seek invalidation. Upon obtaining invalidation of the ordinance, no takings compensation would be possible—either under a total temporary denial of economically viable use (*Landgate*), or a lesser economic impact leading to a "balancing" inquiry (*Cannone*).

In *Yuba Natural Resources, Inc. v. United States*, 821 F.2d, 638, 641-42 (Fed. Cir. 1987), the Federal Circuit held that there was a temporary taking when the United States unlawfully denied a mining permit for six years during which time it claimed to own the minerals. The Eleventh Circuit has similarly been receptive to the concept of temporary takings. *See, e.g., Wheeler v. City of Pleasant Grove*, 833 F.2d 267, 270-71 (11th Cir. 1987).

There is only one state that has been close to adopting California's jaundiced view of temporary takings. In *Woodbury Place Partners v. Woodbury*, 492 N.W.2d 258, 262 (Minn. App. 1992), an appellate court found in a curious decision that, based on Justice Stevens' dissent in *First English*, a regulation that denied all use of property for two years was not a taking because such a finding would otherwise impermissibly segment property.

The conflict between Connecticut, Alaska, the Federal Circuit, and the Eleventh Circuit with California (and an appellate court in Minnesota) is evident.[7]

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[7] There is also a conflict between the California Supreme Court and the Ninth Circuit, as the latter has not substituted due process standards for a takings analysis. In *Richardson v. City and County of Honolulu*, 124 F. 3d 1150 (9th Cir. 1997), the court applied *Nollan v.*

(continued...)

CONCLUSION

If for no other reason than to bring California back in line with the rest of the nation, Peggy Ann Buckley's petition for writ of certiorari should be granted.

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Respectfully submitted,

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[7](...continued)
California Coastal Commission, 483 U.S. 825, and held that rent control regulations must substantially further a legitimate governmental interest. *Richardson*, 124 F.3d at 1165. In so holding, the court recognized--contrary to the California courts' jurisprudence--that takings claims must be resolved under the Just Compensation Clause and not under the Due Process Clause. *Id.* Other courts are in accord with the Ninth Circuit's reasoning in *Richardson*. *See Seawall Associates v. City of New York*, 542 N.E.2d 1059 (NY 1989) (applying the "substantial advancement" takings analysis enunciated in *Nollan* to overturn restrictions against converting single-room occupancy hotel rooms).